STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED January 31, 2003
v	No. 233154 Livingston Circuit Court
ROSS MARK HINCHEY, a/k/a ROSS M. HINCHEY, Defendant-Appellant.	LC No. 00-011893-FH ON REHEARING

Before: Markey, P.J., and Saad and Smolenski, JJ.

PER CURIAM.

Defendant appeals as of right his jury convictions for OUIL, third offense, MCL 257.625, failure to stop after a collision, MCL 257.620, and violation of license restrictions, MCL 257.312. We affirm the convictions and remand for resentencing. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Defendant argues that he was denied the effective assistance of counsel when his trial counsel failed to object to the court's alternate jury selection procedure that did not comply with MCR 2.511(F). To establish ineffective assistance of counsel, a defendant must show: (1) that counsel's performance was below an objective standard of reasonableness under prevailing professional norms; and (2) that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different. Bell v Cone, 535 US ___; 122 S Ct 1843, 1850; 152 L Ed 2d 914 (2002); *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000). Because defendant did not object to or express dissatisfaction with the jury selection procedure, our review is limited to plain error that affected defendant's substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999); *People v Taylor*, 195 Mich App 57, 59-60; 489 NW2d 99 (1992).

In this case, before jury selection, both parties agreed to the court's alternative jury selection process. The court randomly seated a panel of twenty-eight jurors from the pool. After voir dire, six jurors were removed for cause. After each juror was removed, the juror with the next highest seat number to 14 took that person's seat. For example, when the juror in seat 3 was removed, the juror in seat 15 took his place. Next, each party alternated exercising three peremptory challenges. After each juror was removed, he was replaced with the person sitting in the next highest seat number to 14. Replacement jurors were questioned further as needed to

determine if additional challenges for cause existed. The parties then expressed satisfaction with the jury.

MCR 2.115(F) provides,

> Replacement of Challenged Jurors. After the jurors have been seated in the jurors' box and a challenge for cause is sustained or a peremptory challenge is exercised, another juror must be selected and examined before further challenges are made. This juror is subject to challenge as are other jurors.

Our Supreme Court denounced the use of the "struck jury method," which entails seating a large group of jurors at once and alternatively allowing the parties to "strike" the potential jurors until the number of required jurors remain, or a variation thereof. *People v Miller*, 411 Mich 321, 323, 326; 307 NW2d 335 (1981). The Court concluded that any failure to comply with MCR 2.511(F) required automatic reversal where the selection procedure is challenged before the process began, even in the absence of prejudice. *Id*. at 326. Pursuant to the decision in *Miller*, the Court in *People v Colon*, 233 Mich App 295, 303; 591 NW2d 692 (1998), held that the deviation in the jury selection process required reversal despite the absence of actual prejudice.

However, in *People v Green*, 241 Mich App 40; 613 NW2d 744 (2000), this Court recognized the effect of MCR 2.511(A), which was added after *Miller* and *Colon* were decided, on MCR 2.511(F). MCR 2.511(A)(4) provides that "[p]rospective jurors may be selected by any other fair and impartial method directed by the court or agreed to by the parties." The *Green* Court noted that although the *Miller* Court's censure of the "struck jury method" remained viable, MCR 2.511(A) no longer required automatic reversal where deviations from the standard jury process did not implicate the "struck jury method" or affect a defendant's right to exercise peremptory challenges pursuant to MCR 2.511(F). *Green, supra* at 46.

The method employed in this case was not the "struck jury method" as each juror was replaced when removed.[1] However, the replacement juror was not chosen by a random method either. A similar problem existed in *Green*, where the jurors' names once selected were placed in numerical order by their randomly selected juror number. *Green, supra* at 47. The *Green* Court stated that because the parties needed only to look at the next number on the jury pool list to know which juror would be called next, the element of randomness was removed from the jury selection process and thus, the process was flawed. *Id*. However, the Court concluded that this flaw was not fatal because is was possible that the next prospective juror on the list did not appear in court that day, and, therefore, the process was not completely predictable. *Id*. at 47-48.

Unlike in *Green*, in this case, the process by which the replacement juror was chosen was predictable. The replacement jurors were already present, and simply moved to a lower number seat when one was vacated. While flawed, we find that this process did not deny defendant of a

[1] We note, however, that even if this method could be classified as a variation of the "struck jury method", automatic reversal under *Miller* is not required because defendant did not object before the jury selection process began, and defendant would need to show actual prejudice. *Miller, supra* at 326.

fair trial. As the *Green* Court noted, MCR 2.511(A)(4) "provides considerable latitude in the method used by the courts to select juries as long as the procedure is fair and impartial." *Green, supra* at 45-46. Although the element of randomness was removed from the juror replacement process, it was not removed from the jury selection process as a whole. It is possible that this randomly selected initial pool of twenty-eight would be replenished if a sufficient number of challenges were made. In this case, only six challenges for cause were sustained, and the parties each had two of their five peremptory challenges remaining. MCR 6.412(E). We reject defendant's argument that the method was unfair because trial counsel had to keep the background of twenty-eight jurors in mind at the same time because the replacement jurors could be questioned further as needed, as some were. Therefore, even though the jury selection process did not adhere to MCR 2.511(F), it did not violate MCR 2.511.

Furthermore, we find that defendant did not establish his ineffective assistance of counsel claim because defendant did not demonstrate prejudice. Defendant makes no argument to overcome the presumption that defense counsel's decision to agree to the trial court's alternative jury selection process was sound trial strategy. *People v Rice (On Remand)*, 235 Mich App 429, 444; 597 NW2d 843 (1999). Defense counsel may have preferred the predictability of the system, concentrating her selection decisions on a group of twenty-eight versus the entire venire. Nor does defendant proffer any argument as to how he was prejudiced, other than the one rejected above. Therefore, we hold that defendant was not denied effective assistance of counsel.

Regarding defendant's sentencing issue, we conclude that the trial court erred in departing from the sentencing guidelines range without citing substantial and compelling reasons. MCL 769.34(2) and (3); *People v Hegwood*, 465 Mich 432, 439-440; 636 NW2d 127 (2001). When this Court finds that the trial court did not state substantial and compelling reasons for departing from the appropriate sentence range, the sentence should be vacated and the matter remanded for resentencing. MCL 769.34 (11); *People v Babcock*, 244 Mich App 64, 80; 624 NW2d 479 (2000). On remand, the trial court is free to impose any minimum sentence within the guidelines range, or to depart from that range if there is a substantial and compelling reason to do so and such reason is stated on the record. *Id.*

Affirmed and remanded for resentencing. We do not retain jurisdiction.

/s/ Jane E. Markey
/s/ Henry William Saad
/s/ Michael R. Smolenski